Supreme Court, U.S.
FILED
MAY 3 1991
OFFICE OF THE CLERK

(2)

No. 90-1211

# In the Supreme Court of the United States

OCTOBER TERM, 1990

LARRY B. LAUVER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the government's delay in obtaining an indictment against petitioner deprived him of due process.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-18) is unreported, but the judgment is noted at 911 F.2d 734 (Table), *sub nom. United States* v. *Mason*. The opinion of the district court (Pet. App. 1-7) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 20, 1990. A petition for rehearing was denied on November 14, 1990. Pet. App. 19-20. The petition for a writ of certiorari was filed on January 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Tennessee to embezzling funds of an employee benefit plan, in violation of 18 U.S.C. 664. He was sentenced to 18 months' imprisonment. The court of appeals affirmed. Pet. App. 8-18.

1. Petitioner was the president of Administrative Systems, Inc. (ASI). In September 1983, ASI entered into a contract with the Southern Labor Union Health and Welfare Fund (the Union), under which ASI would administer the Union's health benefits plan. The Union ended its relationship with ASI in 1984. Pet. App. 10.

During the summer of 1984, Special Agent Conley Carter of the Federal Bureau of Investigation began investigating allegations of wrongdoing by ASI in administering the Union's health benefits plan. In October 1984, Assistant United States Attorney Nancy Palmer was assigned to handle the case. Agent Carter continued the investigation until June 1986, at which time he sought input from a prosecuting attorney. Palmer did not respond. After Palmer left the United States Attorney's office in January 1988, the case was reassigned to Assistant United States Attorney Jimmy Baxter. At Baxter's direction, Agent Carter conducted additional investigation during 1988. Petitioner was indicted on February 8, 1989. Pet. App. 11-12.

2. Before trial, petitioner moved to dismiss the indictment, claiming that the government's delay in initiating the prosecution deprived him of due process. The district court denied the motion. Citing this Court's decision in *United States* v. *Lovasco*, 431 U.S. 783 (1977), the court ruled that a defendant seeking dismissal of an indictment because of prosecutorial delay "has the burden of showing that the delay was caused by the government solely to gain a tactical advantage * * * *and* that the defendant suffered

actual prejudice as a result." Pet. App. 4 (emphasis in original).

The district court concluded that petitioner failed to satisfy either prong of this test. First, the court found that the government's delay in seeking an indictment against petitioner resulted from a "backlog of criminal cases in the United States Attorney's office" and that there was "no evidence" that the government deliberately had delayed processing the case to gain a tactical advantage. Pet. App. 3-4. Turning to the question of prejudice, the court noted that petitioner's most significant claim of prejudice was that records relating to ASI's administration of the Union's health benefits plan had been thrown away after the Union terminated its contract with ASI.[1] *Id.* at 5-6. The court found, however, that those records were discarded in October 1985, well before Agent Carter completed his investigation, so that even if the government had acted promptly in seeking the indictment, petitioner "would have suffered much of the same harm." *Id.* at 6. The court concluded that petitioner had "shown no causal relationship between the loss of helpful evidence and the Government's prosecutorial delay." *Ibid.* Petitioner then entered a conditional plea of guilty, reserving the right to appeal the denial of the motion to dismiss the indictment. *Id.* at 9-10.

3. The court of appeals affirmed. On appeal, petitioner argued that the government's "reckless disregard" of the risk that prosecutorial delay would prejudice his defense had deprived him of due process. Pet. App. 14. The court of appeals rejected that claim, holding that to establish a deprivation of due process, a defendant must show both

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[1] Petitioner also raised a broader claim that the delay prejudiced him because of "the general dimming of memory and lost contacts with possible witnesses," Pet. App. 5, but the district court rejected that claim without explicit discussion.

that he suffered "substantial prejudice" as a result of the preindictment delay and that the delay was an "intentional device by the government to gain a tactical advantage." *Id.* at 13-15 (quoting *United States* v. *Duncan*, 763 F.2d 220, 222 (6th Cir. 1985)).

The court of appeals agreed with the district court that petitioner had shown neither the intentional governmental misconduct nor the prejudice required to establish a deprivation of due process. Pet. App. 15. The court noted that "[t]he parties agree[d]" that the delay was caused by a backlog of cases in the United States Attorney's office and stated that "we are confident that the failure to give the case higher priority was not a deliberate tactic" by the government. *Id.* at 15-16. The court also rejected petitioner's claim that his defense had been prejudiced by witnesses' loss of memory and the destruction of documents, observing that petitioner had failed to explain how the lost documents or the witnesses' testimony could have aided his defense. *Id.* at 16. Accordingly, the court found no deprivation of due process. *Id.* at 16-17.

## ARGUMENT

Petitioner renews his contention that the government's delay in obtaining the indictment against him deprived him of due process. Pet. 14-18. The court of appeals correctly rejected that claim.

It is well settled that a claim that preindictment delay has deprived a defendant of due process cannot prevail without a showing of "actual prejudice" resulting from the delay. *United States* v. *Lovasco*, 431 U.S. at 789-790; *United States* v. *Marion*, 404 U.S. 307, 324-325 (1971). Moreover, this Court has made it clear that prejudice alone is not enough to require dismissal of an indictment. See *Lovasco*, 431 U.S. at 790 ("proof of prejudice is generally a necessary but not

sufficient element of a due process claim"); *Marion*, 404 U.S. at 324-325 ("no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution"). Thus, although the Court has made clear that some additional showing of governmental misconduct is necessary, it has not yet decided whether the misconduct need be intentional. Compare *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984) (dictum) (dismissal of indictment required if defendant can prove that government's delay in bringing indictment was "a deliberate device to gain an advantage over him"), with *United States* v. *$8,850*, 461 U.S. 555, 563 (1983) (dictum) (due process challenge to preindictment delay can prevail upon a showing of government's "reckless disregard of [delay's] probable prejudicial impact"), and *Lovasco*, 431 U.S. at 795 n.17 (noting government's concession that due process violation might be established on basis of showing of government's reckless disregard of risk of prejudice to defense, but finding "no evidence of recklessness here").

There is no need for the Court to resolve that question in this case. Both courts below found that petitioner had not established that the government's delay in seeking his indictment prejudiced petitioner in any way, and petitioner does not challenge those findings here. Because petitioner failed to make the threshold showing of prejudice necessary to establish that the preindictment delay deprived him of due process, the courts below correctly rejected his claim.

Petitioner's contention (Pet. 14-15) that the decision in this case conflicts with the decision of the Fourth Circuit in *Howell* v. *Barker*, 904 F.2d 889, cert. denied, 111 S. Ct. 590 (1990), is incorrect. In *Howell*, the court found a defendant had been deprived of due process where the State conceded that the defendant had been prejudiced by preindictment delay and that the only justification for the delay

was "mere convenience." 904 F.2d at 895. The court specifically noted, however, that consideration of the government's justification for prosecutorial delay is warranted only after the defendant has shown that he was prejudiced by the delay. *Ibid.* Because petitioner was unable to show that the government's delay in seeking his indictment resulted in actual prejudice, *Howell* would not require a different result in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—282 061/20520